Peter Chin @ Chin Chuan Boo v Chew Pau Guan & Ors

HIGH COURT (KOTA KINABALU) — SUIT NO BKI-22NVCV-15/10 OF 2013
CHEW SOO HO J
18 JUNE 2014

Civil Procedure — Striking out — Writ and statement of claim — Application to strike out based on ground plaintiff's claim was time barred under Sabah Limitation Ordinance — Parties filed affidavits raising several contentious issues of fact and law — Whether plaintiff's claim not 'obviously unsustainable' or a plain and obvious one for striking out without trial

On 21 February 1986, the Native Court had ordered, inter alia, that three acres of land belonging to one Sinok bt Ajau ('Sinok') be transferred to Chin Su Pau ('the deceased'). The plaintiff, who became the administrator of the deceased's estate after the latter died in 1995, however, discovered that in 1987, Sinok had sold two acres of his land to the first defendant and that in 1994, he had sold the remaining acre to the second defendant. The plaintiff filed the instant suit seeking, inter alia, declarations to nullify the transfers to the first and second defendants and for the lands to be registered in his name. The first and second defendants filed an application (encl 12) to strike out the plaintiff's writ and statement of claim pursuant to O 18 r 19 or O 92 r 4 of the Rules of Court 2012 on the sole ground that the plaintiff's claim was time barred under s 3 of the Sabah Limitation Ordinance read with Items 73 and/or 98 of the Schedule therein. The plaintiff, inter alia, contended that the Ordinance had no application to his claim as it was for declaratory relief; that even if the Ordinance applied the claim was not barred by limitation. The submissions between the parties raised several contentious issues of fact and law.

Held, dismissing encl 12:

(1) This was not a plain and obvious case where the power to dismiss the action summarily without going to trial could be resorted to. The plaintiff's claim was not 'obviously unsustainable' on the face of it but required further, and perhaps minute, examination of the evidence of the parties and documents relating thereto as well as the provisions of the Ordinance; whether upon evidence to be adduced at trial, the provisions under the Ordinance were applicable to abridge or extend the limitation period. The plaintiff's writ and statement of claim were not scandalous, frivolous or vexatious or an abuse of process of the court. There was also no question of injustice occurring which required the court to invoke its

inherent powers to prevent it. Both parties could ventilate their respective cases and arguments at trial to assert their respective rights and/or entitlements (see paras 17–18).

[Bahasa Malaysia summary

Pada 21 Februari 1986, Mahkamah Anak Negeri telah memerintah, antara lain, bahawa tiga ekar tanah yang dimiliki oleh seorang yang bernama Sinok bt Ajau ('Sinok') dipindahkan kepada Chin Su Pau ('si mati'). Plaintif, yang menjadi pentadbir estet si mati selepas si mati meninggal dunia pada tahun 1995, walau bagaimanapun, mendapati bahawa pada tahun 1987, Sinok telah menjual dua ekar tanahnya kepada defendan pertama dan bahawa pada tahun 1994, dia telah menjual baki ekar tanah kepada defendan kedua. Plaintif memfailkan tindakan ini memohon, antara lain, perisytiharan untuk membatalkan pemindahan tersebut kepada defendan pertama dan kedua dan untuk tanah tersebut didaftarkan atas namanya. Defendan pertama dan kedua memfailkan permohonan (lampiran 12) untuk membatalkan writ dan pernyataan tuntutan plaintif berikutan A 18 k 19 atau A 92 k 4 Kaedah-Kaedah Mahkamah 2012 atas satu-satunya alasan tuntutan plaintif adalah dihalang masa di bawah s 3 Ordinan Had Masa Sabah ('Ordinan') dibaca bersama dengan perkara 73 dan/atau 98 Jadual di dalamnya. Plaintif, antara lain, berhujah bahawa Ordinan tidak terpakai kepada tuntutannya kerana ia adalah untuk relief perisytiharan; bahawa walaupun Ordinan terpakai, tuntutan tidak dihalang oleh had masa. Penghujahan di antara pihak-pihak membangkitkan beberapa isu perdebatan daripada segi fakta dan undang-undang.

Diputuskan, menolak lampiran 12:

(1) Ini bukan kes yang biasa dan jelas di mana kuasa untuk menolak tindakan secara terus tanpa menggunakan perbicaraan terlebih dahulu. Tuntutan plaintif bukan 'obviously unsustainable' tetapi memerlukan selanjutnya, dan mungkin dengan lebih teliti, pemeriksaan keterangan pihak-pihak dan dokumen berkaitannya dan juga peruntukan Ordinan tersebut; sama ada atas keterangan yang dikemukakan pada perbicaraan, peruntukan di bawah Ordinan adalah diguna pakai untuk menyingkat atau melanjutkan tempoh had masa. Writ dan pernyataan tuntutan plaintif tidak bersifat skandal, remeh atau temeh atau penyalahgunaan proses mahkamah. Juga tidak terdapat soalan ketidakadilan berlaku yang memerlukan mahkamah untuk membangkitkan kuasa inherens untuk menghalangnya. Kedua-dua pihak boleh menyuarakan kes mereka masing-masing dan penghujahan di perbicaraan untuk menuntut hak-hak dan/atau hak masing-masing (lihat perenggan 17–18).]]]]

Notes

For cases on writ and statement of claim, see 2(5) *Mallal's Digest* (5th Ed, 2015) paras 9046–9062.

Cases referred to

Balare Jabu & Ors v Merawa Sdn Bhd & Ors [2011] 4 CLJ 751, CA (refd)
Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)
Director of Forests, Sarawak & Anor v Balare Jabu & Ors and Another Appeal [2012] 7 CLJ 685, FC (refd)
Haji Hussin bin Haji Ali & Ors v Datuk Haji Mohamed bin Yaacob & Ors and connected cases [1983] 2 MLJ 227, FC (refd)
Lee Ngan Choi v Voon Noon [1979] 2 MLJ 28, FC (refd)
Teh Guan Teik v Inspector General of Police & Anor [1998] 3 MLJ 137; [1998] 3 CLJ 153, FC (refd)
Tilakram Laluwa v State of Madhya Pradesh AIR 1966 MP 154, HC (refd)

Legislation referred to

Limitation Act 1953
Rules of Court 2012 O 18 r 19(1)(b), (d), O 92 r 4
Rules of the High Court 1980 O 15 r 15
Sabah Limitation Ordinance (Cap 72) ss 3, 9, 14, 17, 17(1), 18, 23, Schedule

Victor Chong Thein Loi (Poh & Victor Chong) for the plaintiff.
Rebecca Thong Fei Eng (Szetu & Co) for the defendant.

Chew Soo Ho J:

INTRODUCTION

[1] Enclosure 12 is a notice of application filed by the first and second defendant to strike out the plaintiff's writ and statement of claim pursuant to O 18 r 19(1)(b) and/or (d) or O 92 r 4 of the Rules of Court 2012 ie on ground of it being scandalous, frivolous or vexatious or otherwise an abuse of the process of the court or pursuant to the inherent powers of the court to prevent injustice or an abuse of the process of the court. The sole ground as deposed in the affidavit in support affirmed by the first defendant is that the plaintiff's claim is time barred under s 3 of the Sabah Limitation Ordinance (Cap 72) read with Items 73 and/or 98 of the Schedule therein.

BRIEF FACTS

[2] The Mahkamah Anak Negeri, Kuala Penyu had on 21 February 1986 ordered, inter alia, that three acres of the land held under title NT No

18300845 ('the said land') registered in the name of Sinok bt Ajau be transferred to Chin Su Pau ('the deceased') and the Jabatan Kerja Raya, Wilayah Persekutuan, Labuan was asked to surrender the land title in their custody for effecting the transfer of the said land pursuant to the said order of the Mahkamah Anak Negeri. However, until the deceased Chin Su Pau had passed away on 10 October 1995, the said land had yet to be transferred to him.

[3] On 21 March 2013, the letter of administration vide *jadual tiga* was issued to the plaintiff.

[4] Prior to the issuance of the *jadual tiga*, the plaintiff as the personal representative of the said deceased had through his solicitors written to the said Mahkamah Anak Negeri on 30 November 1998 to enforce its order dated 21 February 1986. However, the Ketua Daerah, Pejabat Daerah, Kuala Penyu responded on 9 February 1999 that the said land supposedly to be transferred to the deceased had been sold by Sinok bt Ajau. Upon the assurance to look into the wrongful sale by Mahkamah Anak Negeri and the Assistant Collector of Land Revenue ('ACLR') and upon their advice, the plaintiff lodged a caveat on the said land on 8 June 2000 which was renewed from 2003 until 2012.

[5] On 2 April 2000, Sinok bt Ajau had passed away. Discovering that Sinok bt Ajau had sold the two acres of the said land to the first defendant on 24 March 1987 and the remaining one acre to the second defendant on 26 July 1994, the plaintiff filed this suit and subsequent to the death of Sinok bt Ajau, her son Gipui bin Buki was appointed as personal representative of Sinok bt Ajau, the third defendant vide order of court dated 25 February 2014 for this suit to be proceeded.

[6] In this suit, the plaintiff sought declarations which include declaration to nullify the transfers of the said land to the first and second defendant and for orders that the said land to be transferred and registered in the name of the plaintiff.

SOLE ISSUE IN CONTENTION AND SUBMISSIONS BY BOTH PARTIES

[7] The first and second defendant's contention in this application is on the sole ground that the plaintiffs claim is statute barred by limitation. The plaintiff contended that the Sabah Limitation Ordinance (Cap 72) is not applicable to the plaintiff's claim as the plaintiff's claim is for declaratory relief as held by the Court of Appeal in *Balare Jabu & Ors v Merawa Sdn. Bhd & Ors* [2011] 4 CLJ 751; see also *Director of Forests, Sarawak & Anor v Balare Jabu & Ors and Another Appeal* [2012] 7 CLJ 685 (FC); and *Teh Guan Teik v Inspector General of Police & Anor* [1998] 3 MLJ 137; [1998] 3 CLJ 153 (FC).

It was submitted that this court is bound by the decision in the case of *Balare Jabu & Ors v Merawa Sdn Bhd*. Hence, the plaintiff submitted that the first and second defendant's contention that the plaintiff's action is caught by Sabah Limitation Ordinance is not sustainable and should not be summarily disposed of without trial.

[8] Alternatively, the plaintiff contended that pursuant to s 9 of the Sabah Limitation Ordinance, the said land was held by the said Sinok bt Ajau on trust upon the order of the Mahkamah Anak Negeri and thus, 'no suit against a person in whom property has become vested in trust ... or against his legal representative ... shall be barred by any length of time'. Referring to s 14 of the of the same Ordinance, the plaintiff also contended that the plaintiff had been prosecuting his claim for the said land from Sinok bt Ajau in the Mahkamah Anak Negeri and it is unjust to hold the plaintiff's claim to be caught by the Sabah Limitation Ordinance. Even if the limitation provisions are applicable, the time during which the deceased and the plaintiff had been prosecuting the claim in Mahkamah Anak Negeri shall be excluded under s 14 of the Sabah Limitation Ordinance. Relying on s 17(1) of the said Ordinance, the plaintiff contended that the deceased who passed away on 10 October 1995 and thus the computation of time under s 17(1) shall be from the time when the plaintiff is appointed as the legal representative of the deceased which is from 21 June 2013 when the *jadual tiga* was issued to the plaintiff by the Mahkamah Anak Negeri Kuala Penyu. In addition, the plaintiff contended that upon the fraud or fraudulent concealment of the illegal and wrongful transfer of the said land to the first and second defendant, the time limited for instituting a suit shall be computed from the time when the fraud first became known, inter alia, as provided under s 18 of the said Limitation Ordinance. Lastly, the plaintiff also relied on s 23 of the Limitation Ordinance contending that it is a case of a continuing wrong and hence a fresh period of limitation begins to run at every moment of the time during which the wrong continues citing *Tilakram Laluwa v State of Madhya Pradesh* AIR 1966 MP 154 which defines 'a continuing wrong' to be 'if a wrongful act is of such a character that the injury caused by it itself continues then the act constitutes a continuing wrong'.

[9] On the above contention, the plaintiff submitted that this is not a plain and obvious case for striking out under O 18 r 19(1) of the Rules of Court 2012.

[10] The defendants in reply referred to the declaratory judgment by Zamir & Woolf 2nd Ed, p 1 on the distinction between 'executory judgment' and 'declaratory judgment' in that by 'executory judgment', 'the courts determine the respective rights of the parties and then order the defendant to act in a certain way ...; if the order is disregarded, it can be enforced.' whereas 'a declaratory judgment ... pronounces upon a legal relationships but does not

contain any order which can be enforced against the defendant'. It was submitted that the plaintiff's claim is for executory judgment and not a declaratory judgment and citing the case of *Haji Hussin bin Haji Ali & Ors v Datuk Haji Mohamed bin Yaacob & Ors and connected cases* [1983] 2 MLJ 227 where the Federal Court affirmed the High Court decision to strike out the plaintiff's claim on ground of limitation or laches when the plaintiff's claim was for a declaratory judgment, the defendants contended that the plaintiff's claim can be similarly struck out.

[11] Pertaining the ss 9, 14, 17(1), 18 and 23 of the Sabah Limitation Ordinance raised by the plaintiff, the defendants submitted that s 9 is not applicable as the said land was vested in the late Sinok bt Ajau before the order of the Mahkamah Anak Negeri and the issue of trust was also not pleaded.

[12] On s 14 of the Limitation Ordinance, defendants contended that the proceeding in the Mahkamah Anak Negeri leading to the order dated 21 February 1986 was in relation to a divorce and division of properties between the deceased and Sinok bt Ajau. The deceased and the plaintiff had not prosecuted any proceedings to enforce the said order dated 21 February 1986.

[13] In short, the defendant contended that there is no issue of the alleged time in prosecuting the enforcement of the Native Court order dated 21 February 1986 to be discounted or disregarded for the purpose of computing the limitation period. Referring to s 17(1) of the Ordinance, the defendants submitted that this provision does not assist a plaintiff who, upon the death of the deceased, was capable of suing on behalf of the estate but had not pursued the matter until 14 years later. It was contended that time begins to run not from the date of the deceased's death but from the time when the cause of action accrues citing in support *Rustomji on Limitation Act* (9th Ed), p 358 para 2, and O 15 r 15 of the Rules of the High Court 1980. The deceased passed away on 10 October 1995 and the plaintiff only obtained the *jadual tiga* on 20 May 2013 which by calculation is 18 years later and not 14 years as the defendants had submitted. The defendants submitted that the plaintiff ought not to be allowed to rely on s 17(1) for his laches. In respect of s 18 of the said Limitation Ordinance, the defendants submitted that this provision does not aid the plaintiff for reason that there was no 'active concealment' of the alleged transfers of the said land. Only if the plaintiff or the deceased had made the search in the land registry, it would have revealed and made known to them that the said land had been transferred to the first and second defendant respectively on 24 March 1987 and 26 July 1994. Finally, on the provision of s 23 of the Limitation Ordinance, the defendants contended that the sources of injury being the transfers of the said land had been completed though the resulting damage that the land could not be transferred to the deceased or the plaintiff is

continuing and therefore the wrong cannot be construed a continuing wrong.

[14] Relying on Item 73 in the Schedule of the Sabah Limitation Ordinance which provides that a suit to cancel or set aside an instrument not otherwise provided for is time barred after three years when the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him and Item 98 of the Schedule therein the same Ordinance which provides that a suit upon a judgment obtained in Sabah is time barred after 12 years from the date of judgment, the defendants submitted that the plaintiff was as admitted informed of the transfers of the said land to the first and second defendant on 9 February 1999 and when time begins to run therefrom for three years, plaintiff's claim would be time barred on 9 February 2002 pursuant to Item 73. The Native Court order was obtained on 21 February 1986 and the deceased or the plaintiff was allowed 12 years to enforce the said judgment; limitation would have set in by 21 February 1998 pursuant to Item 98 but plaintiff only filed this suit on 22 October 2013 which had exceeded the limitation as permitted under Item 73 and 98 in the Schedule of the Sabah Limitation Ordinance. Hence, the defendants prayed for the plaintiff's writ and statement of claim to be struck out.

FINDINGS OF COURT

[15] Both parties herein have submitted at length in this application as recapitulated above. From the pleadings of the plaintiff, what he has prayed for are basically for declarations that the respective transfers of the said land to the first and second defendant respectively are null and void and orders for the said land to be retransferred to the deceased or to the plaintiff besides costs. Whether these declarations prayed for will lead to or constitute 'executory judgment' or 'declaratory judgment' and whether the applicable law is the principles laid down by the Court of Appeal in *Balare Jabu & Ors v Merawa Sdn Bhd & Ors* as endorsed by the Federal Court in *Director of Forests, Sarawak & Anor v Balare Jabu & Ors and another appeal* that the Sabah Limitation Ordinance does not apply to claim for declaratory reliefs as contended by the plaintiff or that the declaratory relief sought by the plaintiff would only lead to 'executory judgment' where the Sabah Limitation Ordinance is still applicable as contended by the defendants arguing further that limitation and laches are still valid grounds for an application for striking out citing in support the Federal Court case of *Haji Hussin bin Haji Ali & Ors v Datuk Haji Mohamed bin Yaacob & Ors*, I find this itself is a matter which needs to be inquired further by the trial court as it also involves interpretation of the law basing on the facts of this case as to which is the proper principles of law applicable in the instant case upon the facts to be adduced.

[16] Relating to the provisions under ss 9, 14, 17(1), 18 and 23 of the Sabah Limitation Ordinance which the plaintiff is relying on to contend that on the facts of this case, the plaintiff's claim filed herein on 22 October 2013 is not statute barred because the said land had been vested in Sinok bt Ajau to hold on trust for the deceased upon the Native Court order made on 21 February 1986 (s 9), that the plaintiff had been prosecuting his claim for the said land from Sinok bt Ajau in the Native Court (s 14), that the plaintiff was appointed as the legal representative of the deceased only on 21 June 2013 when the time of limitation would only by then begin to run (s 17(1)), that time only commenced to run where there was fraud or fraudulent concealment of the illegal and wrongful transfer of the said land, upon the fraud first became known, inter alia, (s 18) and that where there is continuing wrong, a fresh period of limitation begins to run at every moment of the time during which the wrong continues (s 23), the defendants contended otherwise as illustrated above which I reiterate but without reproducing them for want of repetition. I find that parties have the respective basis to advance and substantiate their respective arguments. I find that it does not render this case a plain and obvious case that it ought to be struck out. The provisions of ss 9, 14, 17(1), 18 and 23 of the Sabah Limitation Ordinance must be read in their proper context and in line with the facts of the case. For example in the *Rustomji on Limitation* as submitted by the defendants, it states that time begins to run not from deceased's death but from the time the cause of action accrues; this is seen not to have been so provided under s 17 of the Sabah Limitation Ordinance and therefore the provision of the Limitation Act 1953 cannot be invoked to derogate or supercede the specific provision in the Sabah Limitation Ordinance by the maxim of *specialia generalibus derogant*. From the contentions of the parties, it is apparent to me that both parties are to certain extent disputing the facts that allegedly support the various provisions of the Sabah Limitation Ordinance invoked by the plaintiff. This may call for detailed examination of the evidence both oral and in writing in order to determine the issues whether the various provisions of the Sabah Limitation Ordinance are applicable. This coupled with perhaps the necessary interpretation of the respective provisions will necessitate to be inquired further in the trial with viva voce evidence and cross-examination and not purely on affidavit evidence. In *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36, the Supreme Court held, inter alia, as follows:

> (1) The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the Rules of the High Court 1980 are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule and the summary procedure can only be adopted when it can clearly be seen that a claim or answer is on the face of it 'obviously unsustainable'. It cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defence.

> (2) ... So long as the pleadings disclosed some cause of action or raised some question fit to be decided by the judge, the mere fact that the case was weak and not likely to succeed at the trial was no ground for the pleadings to be struck out. It cannot be said that they were frivolous, vexatious or may prejudice, embarrass or delay the fair trial of the action or that these pleadings were otherwise an abuse of the process of the court.

[17] In the instant case, what is clear is the fact that the said land which had been ordered by the Native Court Kuala Penyu vide order dated 21 February 1986 to be transferred to the deceased by Sinok bin Ajau was instead sold to the first and second defendant on 24 March 1987 and 26 July 1994 respectively. Upon this fact, the plaintiff alleged fraud and/or illegality and submitted that the said land became trust property in the hand of Sinok bin Ajau after the said order was made and the various provisions of the Sabah Limitation Ordinance which may be applicable to negate or extend or circumvent the time limitation as contended by the plaintiff. Hence, it is not a plain and obvious case for O 18 r 19(1) of the Rules of Court to be applied to strike out this case. The plaintiff's claim is also not 'obviously unsustainable' on the face of it but it requires further and perhaps minute examination of the evidence of the parties and documents relating thereto as well as the provisions of the Sabah Limitation Ordinance whether upon the evidence adduced, during trial, the provisions under the Sabah Limitation Ordinance relied upon by the plaintiff are applicable to abridge or extend the time of limitation. To repeat the words of the Supreme Court in *Bandar Builder's* case, 'the mere fact that the case was weak and not likely to succeed at the trial was no ground for the pleadings to be struck out'. In the circumstances, I do not find the plaintiff's writ and statement of claim to be scandalous, frivolous or vexatious or otherwise an abuse of the process of the court. It is also to be noted the words of His Lordship Lee Hun Hoe CJ (Borneo) in *Lee Ngan Choi v Voon Noon* [1979] 2 MLJ 28 (FC) at p 29 as follows:

> The power to dismiss an action summarily without permitting a party to trial is a drastic power and should be exercised with utmost caution. The power of summary procedure should only be resorted to in plain and obvious cases.
>
> To reiterate, this is not such a plain and obvious case.

[18] Further, I do not find any injustice which necessitates this court to invoke its inherent powers under O 92 r 4 of the Rules of Court 2012 to prevent it. Both parties can ventilate respective cases and arguments at the trial before the Court to assert their respective rights and/or entitlements. In that sense, there is no question of injustice.

[19] For the foregoing reasons, I dismiss encl 12 with costs in the cause.

Enclosure 12 dismissed.

Reported by Ashok Kumar